

trial court which consisted of two experienced High Court judges.

Accordingly, we affirm the conviction and sentence and dismiss the appeal.

Appeal dismissed.

Solicitors: J. B. Jeyaretnam & Co.

ONG KIANG KEK v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Tan Ah Tah and Wins'ow JJ.) October 21, 1970]

[Singapore — Criminal Appeal No. 6 of 1970]

Criminal Law and Procedure — Trial before High Court — Duty on court to consider at the close of the case of prosecution whether or not a case has been made out against accused which if unrebutted would warrant his conviction — Criminal Procedure Code (Cap. 132) s. 177C.

Penal Code, s. 34 — Common intention.

In this case the appellant had been charged that "together with three other persons unknown, in furtherance of the common intention of all of you, committed murder by causing the death of one Mohamed Salleh bin Haji Hassan, and have thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the Penal Code". At the trial at the close of the prosecution case, counsel for the appellant submitted that he had no case to answer on the ground that the prosecution had failed to make out a *prima facie* case against the appellant. This submission was rejected. The appellant was later convicted and sentenced to death.

Held, allowing the appeal: (1) the trial court is required by section 177C of the Criminal Procedure Code, at the close of the prosecution case to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the accused beyond a reasonable doubt. If the court finds at that stage of the trial that it has not been so established there is nothing left but to acquit the accused;

(2) in this case the evidence tendered by the prosecution was clearly insufficient to establish that at the time when one of the four occupants of the car fired the two shots which killed the deceased, the killing of the deceased was done in furtherance of the common intention of all of them so that it mattered not which of them actually fired the fatal shots;

(3) it was clear that if at the close of the prosecution case the evidence was such that it was possible for the fatal shots to have been fired by any of three of the four men in the car no case had been made against the appellant which if unrebutted would warrant his conviction of murder *simpliciter*;

(4) the trial court was therefore wrong in law in calling on the appellant to enter on his defence whether on the charge of murder read with section 34 or of murder *simpliciter* and the appellant should have been acquitted at the close of the case for the prosecution.

Cases referred to:-

(1) *Public Prosecutor v. Lim Teong Seng & Ors.* [1946] M.L.J. 108.

(2) *Teo Cheng Leong v. Public Prosecutor*, ante p. 275.

COURT OF CRIMINAL APPEAL.

David Marshall (Leo Fernando with him) for the appellant.

S. Rajendran (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the judgment of the court): The appellant, Ong Kiang Kek, was tried before the High Court consisting of two judges, convicted and sentenced to death on the following charge: —

"That you, Ong Kiang Kek @ Ah Boy on or about the 20th day of May, 1969, at or about 11.30 a.m. at Sumbawa Road, Singapore, together with three other persons unknown, in furtherance of the common intention of all of you, committed murder by causing the death of one Mohd. Salleh bin Hj. Hassan, and have thereby committed an offence punishable under Section 302 of the Penal Code read with Section 34 of the said Code (Chapter 119)."

He now appeals against his conviction and it is submitted by counsel for the appellant, *inter alia*, that the judges erred in law in calling upon the appellant for his defence and that the conviction is unreasonable or cannot be supported having regard to the evidence. It is convenient to deal with these two submissions together.

The principal prosecution witness at the trial was the widow of the deceased who was an eye-witness of how the deceased, her husband met his death on 20th May 1969. At that date she was employed as an amah at the Tanglin Club and her husband as a watchman at Thomson Road Hospital. They lived at No. 17B Jalan Kassim and that morning, as was his usual custom, he was taking her on the pillion of his motor-cycle to her place of work. As they were travelling along the middle of Sumbawa Road, the engine of the motor-cycle developed some trouble causing it to slow down gradually. She then heard the sound of horning from a motor car horn, sounded twice, and her husband steered the motor-cycle to the left side of the road and brought it to a stop about one yard from the edge of the road. They both alighted, she to the left and her husband to the right of the motor-cycle and he began tinkering with the engine while she looked on. The motor-cycle was then on its stand. She noticed a car, which she later identified as a Ford Cortina motor car, which had passed them stop about 36 feet — at one stage she said about 60 feet — from the parked motor-cycle and saw four male Chinese alight from it and walk towards where she and her husband were. On seeing them walking in their direction she became afraid and told her husband that these four Chinese were walking towards them.

On being told this, her husband stopped tinkering with the engine of the motor-cycle and walked towards the four men and they met about 30 feet from where she was still standing beside the motor-cycle. She saw the four men group around her husband who had his back to her. One of the four was directly facing her husband and also in her direction and she heard this person ask her husband in Malay the question "why obstruct our path?" She did not hear her husband reply to the question but she herself, from where she was, volunteered the reply in Malay that the motor-cycle was out of order. She said a short dialogue took place between her husband and the four men but she could not hear what was said and then they walked

back in a normal manner towards their car and further away from her, while her husband walked back towards her and continued to try and repair the motor-cycle. At the same time she also saw the four men get into their car, the person who had earlier asked her husband why he obstructed their path getting into the car via the nearside front door of the car. This person the widow identified as the appellant. She saw two others entering via the rear nearside door and "the driver got into the car from the driver's door". She also said she did not know who the driver was.

After they got into the car she did not notice whether the car moved off. Then her husband mounted the motor-cycle. She got on to the pillion seat and her husband started the motor-cycle. Before they could move off she said "the motor car banged into us. The motor car reversed". She could not say whether just before the collision, the motor-cycle was still on its stand but after the collision she and her husband fell off the motor-cycle which also fell. She said the collision was not a "hard bang". After the fall she got up and saw her husband running after the car which was moving forward fast. Then she saw her husband stand still and then the car reversing. At the time her husband stopped chasing the car she said he was on the left side of the road about the width of a car from the edge of the road and about 30 feet — at a later stage in the cross-examination she said about 15 feet — from where she was standing at the edge of the road. She said that when the car was reversing towards her husband he jumped to the left and stood at the place where he landed and the car drove towards where he was standing and when it was near to her husband it stopped, and then she saw "the pistol and hand coming from the front next to the driver's seat". She said that at that time the car was alongside her husband and about 5 feet away from him and she heard two shots and saw her husband fall from his left to his right on the road although earlier on in her evidence she had said that when she heard the shots the car was in front of and about 30 to 40 feet away from her husband.

Within three hours of the shooting the widow picked out, from 30 photographs shown to her by the police, the photograph of the appellant as similar to the person whom she saw facing her talking to her husband. About seven weeks later she picked out the appellant at an identification parade as "the person who shot at her husband".

An autopsy performed on the body of the deceased husband showed there were two gunshot wounds, one fatal from a bullet which penetrated the chest wall, the heart and left lung and lodged within the soft tissue. This bullet was recovered and found to be a .32 bullet.

The appellant was arrested about seven weeks later on 6th July, 1969 and at the time of his arrest he was in possession of a .22 automatic pistol which had eight rounds of ammunition in it and was also in possession of another nine rounds of .22 ammunition.

At the close of the case for the prosecution counsel for the appellant (accused) submitted that there was no case to answer on the grounds that the evidence given by the only prosecution eye-witness of the events

A at Sumbawa Road, the widow, was unreliable as she had contradicted herself before the court on vital matters such as the distance between her and her husband from the car in question when the hand came out of the car and she heard the two shots; and that her credibility could not be relied on because she had given evidence at the preliminary inquiry which was inconsistent and conflicted with her evidence at the trial on several vital matters.

B Unfortunately, counsel for the appellant at the outset of his submission based it on the ground that the prosecution had failed to make out a *prime facie* case against the accused and at the close of his submission based it on the ground that on the widow's evidence the court could not safely convict at that stage.

C In fact the law imposes a duty on the court, whether or not a submission of no case to answer has been made, to consider at the close of the case for the prosecution whether or not a case has been made out against the accused which if unrebutted would warrant his conviction. Section 177C of the Criminal Procedure Code reads: —

D "177C. When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal, or if it does not so find, shall call on the accused to enter on his defence".

E Section 172 which prescribes the procedure to be observed by magistrates' courts and district courts in summary trials contains a paragraph, (f), which is similar in terms to section 177C. It is settled law that under section 172(f) a magistrate's court or a district court is bound to acquit an accused person if, at the close of the case for the prosecution, the court on the evidence then before it has a reasonable doubt as to the guilt of the accused of the offence charged. The reason is because in a criminal case it is a cardinal principle that the burden is on the prosecution to prove the case against the accused beyond a reasonable doubt and accordingly no conviction can be warranted unless at the close of the case for the prosecution the court is left in no reasonable doubt as to the guilt of the accused.

F It has been held that a judge (of the High Court) sitting without a jury, where the relevant section is in *pari materia* with our section 177C and section 172(f), must acquit the accused if, at the close of the case for the prosecution, the court is of the opinion that on the prosecution evidence it cannot, as a jury, hold the allegations proved beyond all reasonable doubt. (*Public Prosecutor v. Lim Teong Seng & Ors.*⁽¹⁾). We are of the same opinion and are of the view that the trial court is required by section 177C, at the close of the case for the prosecution, to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the accused beyond a reasonable doubt. If the court finds at that stage of the trial that it has not been so established there is nothing left but to acquit the accused.

H We must therefore examine whether the evidence at the close of the case for the prosecution has established the case against the appellant beyond a reason-

able doubt so as to justify the trial court's calling on the appellant to enter on his defence.

First, we are of the opinion that the evidence tendered by the prosecution is clearly insufficient to establish that, at the time when one of the four occupants of the Ford Cortina car fired the two shots which killed the deceased motor-cyclist, the killing of the deceased was done in furtherance of the common intention of all of them so that it mattered not which one of them actually fired the fatal shots. Accepting the prosecution evidence at its highest, the common intention was at most a common intention on the part of all four of them to cause some bodily injury to the deceased when the car stopped and started reversing towards the deceased who was chasing after it. It could not be said that there was no reasonable doubt on the prosecution case that all four of them had the common intention of causing the death of the deceased in circumstances amounting to the offence of murder.

We are also of the opinion that although the prosecution elected to prefer a charge against the appellant of murder read with section 34 of the Penal Code which brings in common intention, the evidence tendered by the prosecution at the trial was directed to prove a case against the appellant alone of murder *simpliciter*. It seems to us that when the prosecution closed its case that was the view taken by the trial judges as their decision to call upon the appellant to enter on his defence would otherwise be inexplicable.

We recognise that on this view the trial judges should have, as they had power to do at that stage, amended the charge accordingly but this omission is, in the circumstances of this case, in our opinion in no way prejudicial to the defence. We therefore have now to consider whether the evidence justified the trial judges in calling on the appellant for his defence on a charge of murder *simpliciter*.

In the circumstances of this case the issue rested entirely on the evidence of the deceased's widow and the inferences that could be drawn from her evidence if it could be relied on. This being so she was quite properly questioned at length and in detail on all the material aspects of her testimony. Stripped of all but the bare essentials, her story is that a car which had been blocked along Sumbawa Road by the motor-cycle on which she and her husband were riding stopped after overtaking them and four male Chinese alighted from it and walked towards the edge of the road where the motor-cycle had parked for repair. Her husband walked towards these four persons, a short conversation ensued between her husband and the appellant, who was one of the four, and then these persons walked back and re-entered their car, the appellant entering it by the nearside front door. The car then moved off and for no apparent reason reversed towards the motor-cycle and bumped into it lightly, causing her husband and her to fall off it. Just as inexplicably the car then moved off again, her husband started to chase after it, it reversed towards him, he jumped to his left to avoid being collided into and as the car was somewhere alongside her husband she saw from a distance of about 30 feet a hand holding a pistol come out from the

A nearside front window, heard two shots and saw her husband fall on the road.

B Unless the trial court, after considering the manner in which she gave her evidence before it; her capacity and her reliability for observation and recollection thereafter, having regard to the shock and emotion she was likely to be in at the tragic death of her husband, of events which took place within a space of a few minutes at the most; the fact that she was not a disinterested witness; her credibility; and lastly the inferences that can be drawn as to whose hand it was that she saw; is satisfied beyond a reasonable doubt that the appellant fired the shots that resulted in the death of the deceased, the trial court is bound, by C section 177C of the Criminal Procedure Code, at the close of the case for the prosecution to acquit the appellant of murder.

Although the trial court did not specifically say so we must assume, from its finding that the appellant fired the two shots, that it drew the inference that the hand holding the pistol appearing from the nearside front window of the Ford Cortina car was the hand of the person sitting next to the driver's seat. Although there can be no doubt that such an inference is a reasonable and the most probable inference that can be drawn, it seems to us that other inferences can, on all the facts before the trial court, also be drawn. If a hand is seen appearing out of the nearside front window of a Cortina car in which there are four male occupants it seems to us possible that the hand belonged either to the person sitting next to the driver's seat, or to the person sitting in the driver's seat if he leans to his left, or to the person sitting immediately behind the seat next to the driver if he leans forward.

F The case for the prosecution, on murder *simpliciter*, was that the appellant sat next to the driver's seat and it was the appellant's hand holding the pistol from which the fatal shots were fired which the widow saw although there were three other men in the Cortina car at the time and although the bullet which inflicted the fatal wound was a .32 bullet whereas the appellant when arrested was in possession of a .22 pistol and some .22 ammunition. In our opinion, on these facts and having regard to the other possible inferences which we have endeavoured to show can be drawn from the mere fact that a hand holding a pistol appeared from the nearside front window of the car, the prosecution have failed at the close of its case to discharge the burden resting on it to prove beyond a reasonable doubt that the appellant was guilty of murder. H

I In our judgment it is clear that if at the close of the prosecution case the evidence is such that it is possible for the fatal shots to have been fired by any one of three of the four men in the Cortina car no case has been made out against the appellant which if un rebutted would warrant his conviction of murder *simpliciter*. Accordingly we are of the opinion that the trial court was wrong in law to call on the appellant to enter on his defence whether on the charge of murder read with section 34 or of murder *simpliciter* and the appellant should have been acquitted at the close of the case for the prosecution.

It is unnecessary therefore for us to consider the other grounds of appeal except to state that those grounds of appeal which relate to the jurisdiction of the trial court are without any foundation in law for the reasons which have been fully set out in the case of *Teo Cheng Leong v. Public Prosecutor*.⁽²⁾ The appeal is allowed and the conviction and sentence set aside.

Appeal allowed.

Solicitors: *Ironside & de Souza*.

PUBLIC PROSECUTOR v. RICHARD KWAN

[C.C.A. (Wee Chong Jin C.J., Tah Ah Tah and Winslow JJ.) November 6, 1970]

[Singapore — Case Stated No. 2 of 1970]

Criminal Law and Procedure — Magistrate's court — Jurisdiction of — Criminal Procedure Code (Cap. 132), ss. 9, 10 and 11 — Jurisdiction to try offence punishable with 7 years imprisonment.

Penal Code, s. 420 — Cheating — Whether magistrate's court can try such offence — Whether authorization of Public Prosecutor under Criminal Procedure Code (Cap. 132), s. 11 required.

The question for determination of the Court of Criminal Appeal in this reference was: "Whether or not a magistrate's court in Singapore has jurisdiction to try an offence under section 420 of the Penal Code (Cap. 119) without an authorization by the Public Prosecutor under section 11 of the Criminal Procedure Code (Cap. 132) authorizing the magistrate's court to try such offence."

The material facts were: the accused was charged with and tried before the 4th magistrate's court for having committed an offence under section 420 of the Penal Code. The Public Prosecutor did not authorize the trial of the accused by a magistrate's court. At the conclusion of the trial the accused was found guilty and convicted. He appealed to the High Court and at the hearing of the appeal it was contended on his behalf that the magistrate had no jurisdiction to try him because there was no authorization by the Public Prosecutor in terms of section 11 of the Criminal Procedure Code authorizing the 4th magistrate's court to try the offence set out in the charge against him. Choor Singh J. held that the trial was a nullity as the magistrate's court before which the accused was charged, tried and convicted did not have jurisdiction to hear the case.

Held: (1) *prima facie* where the 8th column of Schedule A to the Criminal Procedure Code shows that a particular offence is triable by a magistrate's court, the provisions of section 11 of the Code are inapplicable;

(2) the question before the court must be answered in the affirmative.

COURT OF CRIMINAL APPEAL.

David Marshall, amicus curiae.

Tan Boon Teik (Attorney-General and Public Prosecutor) in person.

Wee Chong Jin C.J. (delivering the judgment of the court): This is a reference to the Court of Criminal Appeal by the High Court on the application of the Public Prosecutor under the provisions of section 60 of the Supreme Court of Judicature Act, 1969 the material provisions of which are as follows: —

A "60.(1) When an appeal from a decision of a subordinate court in a criminal matter has been determined by the High Court the judge may on the application of any party and shall on the application of the Public Prosecutor reserve for the decision of the Court of Criminal Appeal any question of law of public interest which has arisen in the course of the appeal and the determination of which by the judge has affected the event of the appeal."

B The question of law of public interest which arose in the course of an appeal from the decision of the 4th magistrate's court to the High Court which was heard by Choor Singh J. the determination of which affected the event of the appeal is as follows: —

C "Whether or not a magistrate's court in Singapore has jurisdiction to try an offence under section 420 of the Penal Code (Chapter 119) without an authorization by the Public Prosecutor under section 11 of the Criminal Procedure Code (Chapter 132) authorizing the magistrate's court to try such offence."

D The material facts are these. The accused was charged with and tried before the 4th magistrate's court for having committed an offence under section 420 of the Penal Code. The Public Prosecutor did not authorize the trial of the accused by a magistrate's court. At the conclusion of the trial the accused was found guilty and convicted. He appealed to the High Court and at the hearing of the appeal it was contended on his behalf that the magistrate had no jurisdiction to try him because there was no authorization by the Public Prosecutor in terms of section 11 of the Criminal Procedure Code authorizing the 4th magistrate's court to try the offence set out in the charge against him. Choor Singh J. held the trial was a nullity as the magistrate's court before which the accused was charged, tried and convicted did not have jurisdiction to hear the case.

F The answer to the question of law reserved for our decision depends upon the true construction of sections 9, 10 and 11 of the Criminal Procedure Code and we set out the material provisions hereunder: —

"9.(1) Subject to this Code every magistrate's court shall have cognizance of and power and authority to —

(a) hear, try, determine and dispose of in a summary way prosecutions for offences for which the maximum term of imprisonment provided by law does not exceed three years or which are punishable with fine only;

G 10. Subject to the other provisions of this Code —

(a) any offence under the Penal Code may be tried by the High Court or by any other court by which such offence is shown to be triable in the eighth column of Schedule A to this Code;

H (b) any offence under any law other than the Penal Code may be tried by the High Court or by any other court mentioned in that behalf by such law;

(c) when no court is so mentioned such offence may be tried by the High Court or by any court constituted under this Code:

Provided that —

I (i) no district court shall try any such offence which is punishable with imprisonment for a term which may exceed seven years;

(ii) no magistrate's court shall try any offence which is punishable with imprisonment for a term which may exceed three years.

11. When under the provisions of section 10 an offence is triable by a district court but not by a magistrate's court, the Public Prosecutor may, nevertheless, if he considers it desirable, by writing under his hand, authorize a magistrate's